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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961

No. 46

SOUTHERN CONSTRUCTION COMPANY, INC., and
CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD,
d/b/a PICKARD ENGINEERING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals
for the Sixth Circuit.**

CHARLES C. TRABUE, JR.,
Nashville, Tennessee,
Attorney for Petitioners.

Of Counsel:

TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life and Casualty Tower,
Nashville 3, Tennessee,
HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,
HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

Page

Prayer 1
Opinions below 1
Jurisdiction 1
Question presented 2
Federal rules involved 4
Statement 5
Reasons for granting the writ 12
Conclusion 16
Opinion of Court of Appeals for the Sixth Circuit 17

Cases Cited.

Bain-Nicodemus, Inc., v. Bethay, 40 Tenn. App. 487, 292 S. W. 2d 234 (1953) 10, 11
U. S. for use of Carroll v. Beck, 151 F. 2d 964 (6 Cir., 1945) 10
United States v. Eastport Steamship Corporation, 255 F. 2d 795 (2d Cir., 1958) 13

Statutes Cited.

28 U. S. C. 1254 (1) 2
40 U. S. C. 270 (b) (The Miller Act) 2, 5, 9, 13

Rules Cited.

Federal Rules of Civil Procedure:
Rule 1 5
Rule 8 (e) 5
Rule 13 (a) 2, 3, 4, 10, 11, 12, 13, 14, 15
Rule 13 (b) 4

Textbook Cited.

40 Am. Jur., Payment, § 129 11

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To the United States Court of Appeals for the Sixth Circuit.

Petitioners, Southern Construction Company, Inc., and Continental Casualty Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on August 3, 1961, and its judgment overruling a petition for rehearing entered on August 30, 1961.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 293 F. 2d 493. The opinion of the District Court is contained in the record (23b-42b).

JURISDICTION.

The opinion of the Court of Appeals for the Sixth Circuit was filed on August 3, 1961, and a copy thereof is appended to this petition in the appendix at pp. 17-31.

Petition for rehearing was duly filed by the petitioners and was overruled on August 20, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

The sole question presented by this petition is one of the proper meaning and interpretation of Rule 13 (a) of the Federal Rules of Civil Procedure promulgated by this Court.

The facts of the case are undisputed. The petitioners, Southern Construction Company, Inc., and Continental Casualty Company, were sued by the original plaintiff, Pickard, in the United States District Court for the Middle District of Georgia on two separate contracts under the Miller Act (40 U. S. C. 270 (b)). The suit alleged breach of the two contracts by Southern Construction Company at Fort Campbell, Tennessee, and at Fort Benning, Georgia. The defendants filed an answer and counterclaim embracing all of their payments and counterclaims on both contracts.

Thereafter **the plaintiff**, Pickard, **filed a separate suit**, the present action, in the United States District Court for the Middle District of Tennessee, **suing on the Tennessee contract only.** The plaintiff did not formally delete the Tennessee contract from the Georgia case until a later time, but the plaintiff filed its separate suit in Tennessee for "jurisdictional" reasons under the Miller Act. To the Tennessee suit the defendants filed an answer and counterclaim, setting up certain payments which they claim to have been made on account of the plaintiff under the Tennessee contract.

One payment which had been made by the defendant Southern Construction Company on behalf of Pickard pertained almost entirely to the Tennessee contract, but it did involve also, to some extent, the Georgia contract,

and was, at least to a limited extent, incidental to the Georgia contract as well as to the Tennessee contract. It involved the settlement of a **wholly disputed account** in connection with the Georgia case and of **an entirely undisputed account in the Tennessee case.** At the time of the first suit, this payment had not been allocated by Southern, the payor, nor by Pickard, the beneficiary of the payment, nor by Atlas Supply Company, the recipient of the payment, to either of the jobs. It was immaterial to any party that the item be allocated to one job or the other, until Pickard separated his suits and sued separately on the Tennessee contract.

When this occurred, **Southern undertook to claim credit for the payment on the Tennessee contract in the Tennessee case.** The Georgia case was tried first, and **neither party credited or claimed the payment in that trial.** The District Court, in the present case, held that credit should be allowed in Tennessee for the payment, since the payment arose almost entirely out of the Tennessee contract, pertained if at all, only very slightly to the Georgia contract, and had not been litigated in the Georgia case.

The Court of Appeals for the Sixth Circuit reversed this holding, and held that the item in question should have been claimed by Southern in the Georgia case, and could not be claimed in the Tennessee case, although the Court of Appeals found the facts to be as above stated, and found that the payment had been made to satisfy an undisputed account in connection with the Tennessee contract. The Court of Appeals practically conceded that its decision worked an "inequitable hardship" upon Southern, and that it was based on "a technical question of procedure", but the Court held that this item was a "compulsory counterclaim" in the Georgia case under Rule 13 (a) and that since the Georgia suit was filed first, Southern had to plead the payment there.

The Court entirely overlooked the fact that **the defendant Southern was later faced with a separate suit embracing only the Tennessee contract**, and seemed to feel that this consideration was unimportant. It also disregarded the power of a court to allocate previously unallocated payments upon basic principles of equity and justice.

The primary question presented is, therefore, whether or not under Rule 13 (a) a defendant who is sued in **two different courts** at **two different times**, on **two separate contracts**, may plead his payments and credits on the two contracts according to the factual basis underlying the payments, or whether on a "technical question of procedure" he is compelled to claim credit for his payments in the first suit in which he has to plead, regardless of the factual basis underlying his payments.

FEDERAL RULES INVOLVED.

Involved here is Rule 13 (a) of the Federal Rules of Civil Procedure which provides as follows:

> "(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Rule 13 (b) provides as follows:

> "(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence

that is the subject matter of the opposing party's claim."

Also involved is Rule 1 of the Federal Rules of Civil Procedure which provides as follows:

> "**Scope of Rules.** These rules shall govern the procedure in the United States district courts and all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. **They shall be construed to secure the just, speedy and inexpensive determination of every action.**"

Further involved is Rule 8 (c) which provides as follows:

> "**Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . payment . . . and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, **the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.**"

STATEMENT.

These suits arose under the provisions of the Miller Act, 40 U. S. C. 270 (b). The facts are entirely undisputed, as the case now comes before this Court, and were found in detail by the United States District Court in its decision of the case. The findings of fact of the District Judge were not disturbed by the Court of Appeals for the Sixth Circuit, and the opinion of that court restates the facts in language almost identical to that contained in the findings and conclusions of the District Judge.*

Southern Construction Company was the prime contractor on a project for the rehabilitation of certain barracks

* References herein are to the page numbers of the printed Appendices filed below. Page numbers in the appendix of Appellant below are followed by "a"; those of Appellees below are followed by "b".

at Fort Campbell, Tennessee. It was bonded by Continental Casualty Company. On May 5, 1955, Pickard entered into a subcontract with Southern to do the plumbing and heating required in the specifications of the prime contract for the sum of $50,000 (45b-46b).

Under the terms of this agreement Pickard was to furnish all labor and materials and was to do the plumbing and heating in accordance with the plans and specifications of the contract. He was required to furnish to Southern a performance bond guaranteeing faithful performance by him and payment for his labor and materials. Upon breach of the contract by Pickard, Article XIII of the contract authorized Southern to complete the work at Pickard's expense and to terminate Pickard's employment, take possession of the premises and hold Pickard liable for any costs in excess of the contract price (8b).

Work began on the subcontract by Pickard in May or June, 1955, and continued until December 16, 1955, at which time Pickard left the job without notice (46b).

Pickard was unable to furnish the required performance bond on the project and remained unbonded throughout the course of the work (1d).

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with Southern Construction Company for rehabilitation of barracks at Fort Benning, Georgia. **Pickard's primary supplier for both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company of Atlanta, Georgia** (46b).

On October 7, 1955, there was executed a supplemental agreement between Pickard and Southern which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell; that Pickard had been unable to obtain performance

bonds on these various jobs; that Southern had been holding certain funds due him in lieu of said bonds; and that Pickard was in need of funds with which to complete the jobs and to pay other bills. Under this agreement Southern waived the provision requiring performance bonds, and Pickard waived all claims against Southern as a result of the withholding of any funds due Pickard in lieu of bond. Pickard further authorized Southern to withhold all other and further payments on work completed or to be completed during the course of the jobs until the completion of each job by Pickard and the final acceptance and payments thereof by the Army to Southern, excepting payments therein agreed to be made, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or material men, or to Pickard, as Southern is paid on requisitions which include labor and/or materials furnished by such subcontractors and/or material men" (47b-48b).

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee and were never heard from again. No notice of any sort was given by Pickard or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor (49b). At the time when Pickard withdrew from the Fort Campbell project, the work required there under his subcontract was from 96% to 98% completed (50b). Southern completed the work at Fort Campbell and obtained final settlement from the United States Government in April, 1956 (50b).

Shortly after Pickard left the work at Fort Campbell he also left the Fort Benning project (51b).

On October 7, 1955, when the supplemental agreement was executed, and at all times thereafter Pickard owed an unpaid balance in the amount of $34,520 to Atlas Supply Company for materials furnished to Pickard by Atlas at Fort Campbell (48b).

In addition to this amount, Atlas Supply Company was claiming a balance due it from Pickard in the sum of $104,000 on the Fort Benning job (51b). **Southern did not dispute the amount of the Atlas account at Fort Campbell. However, it disputed the Fort Benning Claim of Atlas in its entirety** (51b; 81b).

In August, 1956, a conference was had between Southern officials and representatives of the Atlas Supply Company. As a result of this conference Southern paid to Atlas Supply Company, in August, 1956, the sum of $35,000 and obtained from Atlas a complete release of its liability under the Miller Act on Pickard's accounts, both at Fort Benning, Georgia, and at Fort Campbell, Tennessee (51b; 38a-39a).

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard and was carrying them as one consolidated account. Atlas credited the $35,000 payment against this single account, so that **Pickard received full credit for this payment on his indebtedness to Atlas.** Neither Southern nor Atlas at the time of this payment specifically undertook to allocate the $35,000 payment, or any part thereof, to one project or the other (52b).

Pickard gave no credit to Southern for this payment on either job, and his books did not reflect the payment. There is no evidence that Pickard knew of the payment in August, 1956, but in April, 1957, his attorneys were advised by the attorney for Southern that the payment had been made, and that the same had not been allocated by Southern either to the Fort Benning or the Fort Campbell project (52b).

In December, 1956, Pickard filed suit in the District Court for the Middle District of Georgia against Southern and the Continental Casualty Company on **both the Fort**

Benning contract and the Fort Campbell project (52b; 40a-44a). Southern filed an answer and counterclaim in which it alleged that it had paid to Pickard sums in excess of the total contract price on each job and sought judgment for such excess. Included in the counterclaim at this time was the $35,000 payment made in August, 1956, to Atlas (46a-47a; 53b).

In April, 1957, however, Pickard filed the present action in the United States District Court for the Middle District of Tennessee on **the Fort Campbell project only** (19b-22b). The Fort Campbell phase of Pickard's claim was subsequently eliminated from the Georgia proceedings and was not litigated in the Georgia case (51a-52a). Pickard's reason for filing the separate suit in Tennessee was that the Miller Act itself requires that every suit brought under its provisions "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U. S. C. 270b (b). The question of jurisdiction had not been raised by Southern or Continental Casualty in the Georgia proceedings.

The Georgia case was tried first, in March, 1959. In the trial of that case Pickard introduced certain sworn exhibits in which he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning and to give credit for the same. He **did not include this $35,000 payment made by Atlas to Southern in August, 1956**, although his counsel had a copy of the check and the release from Atlas in their possession at the time of the Georgia trial (53b).

Southern listed on exhibits filed by it in that case the payments made by it to Pickard or on his behalf on the Fort Benning job, for which Southern claimed credit. **The $35,000 payment made to Atlas was not claimed in these**

exhibits. The District Judge found as a fact in the present case that the $35,000 payment to Atlas in August, 1956, **was not submitted to or considered by the jury in the trial of the Fort Benning case.** He further found as a fact that **this item had not been litigated or adjudged by the District Court in Georgia,** and that **credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in the Georgia Court** (53b). The Court of Appeals for the Sixth Circuit did not disturb these findings.

The District Judge stated in his findings of fact that although the $35,000 payment was included in the original counterclaim filed by Southern in the Fort Benning case, it was, prior to the trial in that case, eliminated by Southern from its counterclaim, that it was included by Southern as part of its counterclaim and defense in the present suit, and that Southern claimed credit for $34,520 thereof toward the contract price of the Fort Campbell project (53b-54b). The **District Judge allowed the credit claimed in the Tennessee case** (62b-67b), but as previously stated, the Court of Appeals for the Sixth Circuit reversed this holding and held that under Rule 13 (a) of the Federal Rules of Civil Procedure Southern was **compelled** to claim the $35,000 **in its entirety** in the Georgia case.

As stated, the Court of Appeals for the Sixth Circuit reached this result in spite of the equities and justice of the case, indicating that it might have reached a different result "if there had been an allocation of the $35,000 payment between the indebtedness to Atlas Supply Company at Fort Benning and the indebtedness at Fort Campbell." The Court entirely overlooked the basic principles of law governing the power of any court to allocate payments between disputed and undisputed accounts, or to allocate payments according to basic principles of equity and justice. See **U. S. for use of Carroll v. Beck,** 151 F. 2d 964 (6 Cir., 1945); **Bain-Nicodemus, Inc. v. Bethay,** 40 Tenn.

App. 487, 292 S. W. 2d 234 (1953); 40 Am. Jur., **Payment**, § 129.

The Court of Appeals for the Sixth Circuit reached its decision by a very technical construction of Rule 13 (a). It held that the $35,000 payment was "a potential compulsory counterclaim" in either of the two suits which Pickard had filed, and that its "compulsory status" matured in the suit "**in which and at the time when Southern first filed a responsive pleading**". It entirely overlooked the fact that Pickard himself had made an error of procedure and had embraced the Tennessee contract in the Georgia suit, **so that at the time when Southern first had to file a responsive pleading, both contracts were embraced in the Georgia case.** The holding indicates that the plaintiff may at his discretion delete part of his initial suit, file it elsewhere, and **thereby deprive the defendant of the right to defend the second suit on its facts**, because of the existence of Rule 13 (a). None of the cases cited by the court presented fact situations even closely similar to the present case.

We respectfully submit that Rule 13 (a) was never intended to accomplish an inequitable result such as was reached in the present case, and that the facts of the present case do not fall within Rule 13 (a). The **basic purpose and spirit of Rule 13 (a) was to prevent multiplicity of litigation. The defendants and petitioners in the present case have in no sense violated the purpose of that Rule. They have not initiated any suit at any time**, but **have simply sought to defend two separate suits upon the basic facts pertaining to each.**

The item of $35,000 is not in a true sense a "counterclaim" but actually constitutes a payment, and is a matter of defense. Southern undertook, because of the undisputed underlying facts, to allocate $34,520 of the payment to the Tennessee case, and the District Judge held that it

had this right, and that Pickard could not possibly be prejudiced by the proposed allocation, since he received full benefit of the payment and had not himself undertaken to allocate or give credit for it in either of the two suits which he had brought. The holding of the Court of Appeals for the Sixth Circuit compels Southern to undertake to reopen the Georgia case and to claim the entire item in that case, despite the fact that Southern did not recognize any liability to Atlas on the Georgia contract, and disputed Pickard's account with Atlas in Georgia in its entirety, while recognizing the validity of Pickard's indebtedness to Atlas in Tennessee to the extent of $34,520.

REASONS FOR GRANTING THE WRIT.

This is a case of first impression. We have found no reported case which deals with the problem here presented. The undisputed facts show that the case does not fall within the literal terms of Rule 13 (a), and that only by a forced, harsh and inequitable construction of Rule 13 (a) has the Court of Appeals for the Sixth Circuit reached its decision. That Court ignored the basic equity and justice of the position of the petitioners; has ignored the basic meaning and purpose of the Federal Rules of Civil Procedure; and has evolved a new concept, that of a "potential compulsory counterclaim in either of . . . two suits", while at the same time ignoring the fact that under its holding the defendants were never afforded an opportunity to assert the item in question in the Tennessee suit.

Actually Rule 13 (a) does not, by its terms, embrace a situation where there are two separate pending actions by the same plaintiff against the same defendants. This is a fact situation which may be unusual, but it is clearly presented in the present case. In order correctly to apply Rule 13 (a) in any situation, the purpose and underlying reason for the rule must be examined, and when this is

done, it is clear that Rule 13 (a) was promulgated for the purpose of **preventing multiplicity of litigation** between parties having opposing claims against each other. It never was designed **to prevent a defendant from asserting his defenses** according to the facts underlying them where there are two separate and distinct transactions between the parties which are the subject matter of two separate and distinct suits.

Such was the situation presented here. Southern was first sued in Georgia by Pickard on both contracts. As long as the suit remained thus, there was no reason for Southern to try to allocate the $35,000 payment between either of the two jobs, since its defenses and counterclaims on both contracts could be asserted the one suit. **We concede that as long as the case remained in this posture, Southern could not itself have "split off" part of its defenses or counterclaims and filed a separate suit against Pickard in another jurisdiction.** This was the type of procedure disapproved in **United States v. Eastport Steamship Corporation**, 255 F. 2d 795 (2d Cir. 1958). **When, however, Pickard himself deleted part of his claim and brought a separate suit thereon in Tennessee, we submit that basic fairness and justice dictate that the defendant to the second action be permitted to frame his defenses according to the factual basis upon which his payments were made.** Under the undisputed facts in this case, the $35,000 payment made by Southern to Atlas in August 1956 pertained to a wholly undisputed account of $34,520 arising out of the Fort Campbell contract, and to settlement of a wholly disputed claim of Atlas against Southern and Pickard at Fort Benning. Southern did not concede the Fort Benning account to be valid in the least, and disputed in its entirety the Atlas claim that Pickard was indebted to it at Fort Benning.

Southern, of course, under the Miller Act was secondarily liable to all suppliers of Pickard on either job.

The fact that Southern must have been correct in its position that the Fort Benning account was entirely inaccurate is plainly borne out by the fact that Atlas gave Southern a complete release on both jobs for the sum of $35,000. Southern was a bonded and reputable contractor, and there was no possible reason for Atlas so drastically to reduce its claims unless Southern's position were entirely correct. Pickard, of course, was shown by the evidence to be unable to provide a bond, and was an insolvent subcontractor. By settling with Southern, Atlas gave up any practical hope of recovering on its accounts with Pickard, and in releasing Southern and Continental Casualty, it released the only sources from which it might have any real hope of collection.

We recognize the words "transaction or occurrence" found in Rule 13 (a) are given a broad and liberal interpretation. There can be no quarrel with this, when viewed in the light of the purpose of Rule 13 (a) to prevent multiplicity of litigation. **The decided cases deal with fact situations where a defendant has a potential counterclaim against the plaintiff, and undertakes himself to initiate new litigation against the plaintiff in a different court or in a different suit.** It was this type of procedure which Rule 13 (a) was designed to prevent. The Rule has no application, however, to the situation now presented.

The District Judge, we submit, correctly analyzed the situation when he said that Southern was faced with a situation where the item of $35,000, if it fell within Rule 13 at all, could well have been compulsory in either case if the two suits had been filed simultaneously and separately. It certainly pertained, almost in its entirety, to the Tennessee "transaction or occurrence." It pertained, if at all, only very slightly and incidentally to the Georgia "transaction or occurrence." It certainly would be inequitable, unjust and unfair to require the defendant to

assert the item in the Georgia case **without ever having a chance to assert it in the Tennessee case.** The District Judge held, of course, that if Southern had undertaken to litigate the item in the Georgia case, it could not do so in Tennessee. Where, however, neither Southern nor Pickard recognized the item in the Georgia case as it finally went to trial and where credit was neither given nor claimed for it there, the District Judge held that the claim could be asserted in the Tennessee case. We submit that this holding was imminently correct, and that the holding of the Court of Appeals to the contrary is based upon a strained, abstruse and incorrect interpretation of Rule 13 (a).

Actually in the last analysis, this item was simply one of "payment", and was a **defense** asserted by Southern against Pickard. It did, of course, comprise part of a "counterclaim" in the sense that Southern claimed it had paid more to Pickard on his behalf than the contract price. Southern, however, has waived any affirmative relief against Pickard in the Tennessee case, and has and is claiming credit for this payment only as a part of its defense to Pickard's suit. When further consideration is given to the fact that Pickard himself cannot possibly be prejudiced by the proposed allocation of the payment, inasmuch as he himself did not recognize the validity of the payment in the Georgia proceeding, and did not insist that it be allocated there, and when it is further considered that Southern can be exposed to a substantial judgment in favor of an unbonded, insolvent subcontractor in Tennessee if the proposed credit is denied, the basic inequity and injustice of the decision of the Court of Appeals for the Sixth Circuit become apparent. The Federal Rules of Civil Procedure should not be given an interpretation so as to sanction so serious a miscarriage of justice, where such an interpretation is neither compelled nor desirable.

CONCLUSION.

Our failure to discuss in detail the reported cases in this petition is not inadvertent. As stated, we have found no case which deals with a fact situation or a procedural situation similar to the one in question. We realize that in considering a petition for a writ of certiorari this Court is not, as a general rule, concerned primarily with whether the decision below is correct or incorrect, but we do understand that the Court is deeply concerned with the proper interpretation and application of its own rules of civil procedure. When these rules have been used for the purpose of defeating justice, rather than of promoting a speedy, just and inexpensive determination of litigation, then we submit that a case is presented where this Court should exercise its powers. We earnestly request the Court to grant the petition of certiorari, to revise the judgment of the Court of Appeals for the Sixth Circuit insofar as the same pertains to the compulsory counterclaim feature of the case, and to reinstate the judgment of the District Court in this cause.

Respectfully submitted,

CHARLES C. TRABUE, JR.,
Nashville, Tennessee,
Attorney for Petitioners.

Of Counsel:

TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life and Casualty Tower,
Nashville 3, Tennessee,

HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,

HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

OPINION.

(Filed Aug. 3, 1961, Carl W. Reuss, Clerk.)

No. 14,239.

United States Court of Appeals
For the Sixth Circuit.

United States for Use of Samuel J. Pickard, d/b/a Pickard Engineering Company, Plaintiff-Appellant, v. Southern Construction Co., Inc., and Continental Casualty Company, Defendants-Appellees.	Appeal from the United States District Court for the Middle District of Tennessee.

Decided August 3, 1961.

Before: Miller, Chief Judge, Cecil, Circuit Judge, and Boyd, District Judge.

Miller, Chief Judge. This action was filed under the provisions of the Miller Act, Section 270b, Title 40, United States Code, in the name of the United States of America for the use of Samuel J. Pickard doing business as Pickard Engineering Company, against the appellees, Southern Construction Company, Inc., hereinafter called Southern, and Continental Casualty Company, surety on its pe

formance bond, to recover on a construction contract alleged by Pickard to have been breached by Southern.

Southern Construction Company was the prime contractor on a project for the rehabilitation of certain barracks at Fort Campbell, Tennessee. On May 5, 1955, Pickard entered into a subcontract with Southern to do all the plumbing and heating required in the specifications of the prime contract at the contract price of $50,000.00. The complaint alleged that under the subcontract Southern failed to make the required progress payments to Pickard as the work progressed; that without justification it withheld funds from the plaintiff for long periods of time, rendering it impossible for plaintiff to meet its payment obligations to its suppliers, labor and materialmen; that despite the failure of Southern to abide by the contract, plaintiff prosecuted the work to substantial completion but received from Southern only one progress payment in the amount of $13,000.00. Plaintiff sued for the specified contract price of $50,000.00 less this payment of $13,000.00.

Under the subcontract Pickard was required to furnish a performance bond to Southern in the amount of $50,000.00, guaranteeing faithful performance of the subcontract. Pickard was unable to furnish the required performance bond on this project, and remained unbonded throughout the course of this work. Work began on the contract by Pickard in May or June 1955 and continued until December 16, 1955.

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with Southern for rehabilitation of barracks at Fort Benning, Georgia. Pickard's primary supplier for both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company.

On October 7, 1955, there was executed a supplemental agreement between Pickard and Southern, which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell; that Pickard had been unable to obtain performance bonds on the various jobs; that Southern had been holding certain funds due him in lieu of said bonds; and that Pickard was in need of funds with which to complete the jobs and to pay other bills. Under this agreement Southern waived the provision requiring payment for performance bonds and Pickard waived all claims against Southern as a result of the withholding of any funds due Pickard on requisition in lieu of bond. Pickard further authorized Southern to withhold all other and further payments on work completed or to be completed during the course of said jobs, until the completion of each job by Pickard and the final acceptance and payment thereof by the Army to Southern, excepting payments therein agreed to be made, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or materialmen, or to Pickard, as Southern is paid on requisitions which include labor and or material furnished by such subcontractors and/or materialmen."

After October 7, 1955, and prior to December 16, 1955, when Pickard withdrew from the job, Southern received from the Government two payments, one on October 17, 1955, in the amount of $12,002.46 and one on November 4, 1955, in the amount of $15,512.95. Southern failed to pay appellant or his suppliers or materialmen as it received these payments from the Government, as required by the contract.

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee, and were never heard from again. No notice of any sort was given by Pickard, his foremen

or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor. At the time when Pickard withdrew from the Fort Campbell project, the work required there under his subcontract was from 96% to 98% completed. Southern completed the work at Fort Campbell and obtained final settlement from the United States Government in April 1956.

Shortly after Pickard left the work at Fort Campbell he also left the Fort Benning project.

On October 7, 1955, when the supplemental agreement was executed, and continuously thereafter to the time when Pickard left the Fort Campbell job there was an unpaid balance in the amount of $34,520.00 on the account to the Atlas Supply Company for materials furnished by Atlas at Fort Campbell. In addition to this amount, Atlas Supply Company was claiming a balance due it from Pickard in the sum of $104,000.00 on the Fort Benning job. Southern did not dispute the amount of the Atlas account at Fort Campbell. However, it disputed the Fort Benning claim of Atlas in its entirety. In August 1956 a conference was had between Southern officials and representatives of the Atlas Supply Company, as a result of which Southern paid to Atlas Supply Company in August 1956 the sum of $35,000.00 and obtained from Atlas a complete release of all liability of Southern on Pickard's accounts, both at Fort Benning, Georgia, and Fort Campbell, Tennessee.

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard, and was carrying them as one consolidated account. Atlas credited the $35,000.00 payment against this single account so that Pickard received full credit for this payment on his indebtedness to Atlas. Neither Southern nor Atlas at the time of this payment specifically undertook to allocate the $35,000.00 payment, or any part thereof, to

one project or the other. It was a single indivisible payment applicable to both projects.

Pickard gave no credit to Southern for this payment on either job, and his books did not reflect the payment. There is no evidence that Pickard knew of the payment in August 1956 at the time when it was made. In April 1957, however, Pickard's attorneys were advised by the attorney for Southern that this payment had been made, and that the same had not been allocated by Southern either to the Fort Campbell project or to the Fort Benning project.

In December 1956 Pickard filed suit in the District Court for the Middle District of Georgia against Southern and the Continental Casualty Company on both the Fort Benning contract and the Fort Campbell project. Southern filed an answer and counterclaim, in which it alleged that it had paid to Pickard sums in excess of the total contract between the parties and sought judgment for such excess. Included in the counterclaim at this time was the $35,000.00 payment hereinabove referred to.

In April 1957, however, Pickard filed the present action in the United States District Court for the Middle District of Tennessee on the Fort Campbell project only, and this part of Pickard's claim was subsequently eliminated by amendment from the action pending in the District Court in Georgia. The action in the District Court in Tennessee was filed for "jurisdictional" reasons, in that the Miller Act provides that every suit instituted under its provisions "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere. . . ." **Section 270b (b), Title 40, United States Code.**

In the trial of the Fort Benning case in Georgia in March 1959, Pickard introduced certain exhibits in which

he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning, and to give credit for the same. He did not include the $35,000.00 payment made to Atlas by Southern in August 1956. Southern listed on exhibits filed in that case the payments made by it to Pickard or on his behalf on the Fort Benning job, for which Southern claimed credit. The $35,000.00 payment made to Atlas was not claimed in these exhibits. The District Judge stated that the record in the Georgia case showed that the $35,000.00 payment to Atlas was not submitted to nor considered by the jury in the trial of the Fort Benning case. He found as a fact that this fund had not been litigated or adjudged by the District Court in Georgia, and that credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in that court. The District Judge stated in his findings of fact that although the $35,000.00 was included in the original counterclaim filed by Southern in the Fort Benning case, it was prior to the trial in that case, "dropped" from Southern's counterclaim in that case, has been included by Southern as part of its counterclaim and defense in the present case, and that Southern claims credit for $34,520.00 thereof toward the contract price of the Fort Campbell project. We are unable to tell from the record before us whether the original counterclaim in the Georgia suit was amended after the Tennessee suit was filed so as to withdraw this claim from the pleadings, or if it was "dropped" merely by the action of the parties in not presenting it in the trial of that case [compare Rule 15 (b), Rules of Civil Procedure], or if it was removed from the case by pretrial procedure under Rule 16, Rules of Civil Procedure. For the reason hereinafter stated, we believe it is immaterial.

Appellant's original complaint in this action filed on April 4, 1957, sought recovery in the amount of $37,000.00

under the contract of May 5, 1955, covering the Fort Campbell job. On June 17, 1959, appellant moved to amend the complaint, and on July 31, 1959, filed an amended complaint seeking to recover $100,310.08 on a quantum meruit basis for the reasonable value of labor, materials and services furnished by him to Southern on the Fort Campbell job.

The amended complaint alleged that, except for a few minor details, appellant completed its contract work; that it became impossible to complete these details because of virtual abandonment of the prime contract work by Southern; and that such action on the part of Southern, together with its failure to make the required payments for the work as it progressed, constituted breaches of the contract by Southern entitling appellant to relief on a quantum meruit basis.

Southern filed an amended answer and counterclaim denying certain material allegations of the amended complaint, and alleging affirmatively that appellant defaulted in the performance of the contract, by reason of which Southern was required to complete the work under the Fort Campbell contract, and that it had paid to the appellant or for his account in order to complete said contract the sum of $57,412.27, which was in excess of the contract price of $50,000.00. It sought judgment against appellant in the amount of $7,412.27.

The jury did not return a general verdict, but answered certain factual questions submitted to it. Three of these questions, which we thing material in our present consideration of the case, are as follows:

> 1. Did defendant, Southern Construction Co., Inc., by so conducting its own operations, interfere with the plaintiff Pickard in the performance of his work?
>
> Answer: (No)

2. Did defendant, Southern Construction Co., Inc., fail to pay plaintiff Pickard or the suppliers or materialmen of Pickard as it received payments from the Government for work performed by Pickard?

Answer: (Yes)

3. If you answer either question 1 or 2 Yes, was Plaintiff Pickard induced to leave the work, either by defendant's interfering with his work or by its failure to make payments required by the contract?

Answer: (Yes)

The District Judge held that appellant was not entitled to recover in quantum meruit and any recovery in its favor must be limited to the contract price.

The District Judge also ruled that Southern was entitled to use as a counterclaim in this action the $35,000.00 payment which it made to the Atlas Supply Company in August 1956, thus rejecting appellant's contention that under Rule 13 (a), Rules of Civil Procedure, it was a compulsory counterclaim in the suit filed first in Georgia, by reason of which it was barred from being used as a counterclaim in the present action.

Applying these two rulings to the facts of the case, the District Judge held that the $35,000.00 credit, together with the other payments admittedly made by Southern on the contract, made a total in excess of the contract price expended by Southern, and since Southern in open court waived any affirmative relief on its counterclaim, judgment was entered dismissing the action and denying any relief on the counterclaim. On this appeal, appellant challenges both of the rulings.

Right of Recovery in Quantum Meruit.

Appellant relies upon the well settled rule that under certain conditions a material breach of contract by one of the parties thereto confers upon the other party to the contract the right to rescind and abandon the contract and to recover in quantum meruit for the reasonable value of services and materials furnished. In a building or construction contract calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to proceed. Under such circumstances the contractor cannot be expected to finance the operation to completion without receiving the stipulated payments on account as the work progresses. **Guerini Stone Co. v. Carlin Construction Co.**, 248 U. S. 334, 344-345; **Pickens County v. National Surety Co.**, 13 F. (2) 758, 761, C. A. 4th; **United States v. Zara Contracting Co.**, 146 F. (2) 606, 610, C. A. 2nd; **United States v. Americo Construction Co.**, 168 F. Supp. 760, 761, D. C. Mass.; **Restatement, Contracts, Section 347.**

The District Judge recognized this rule but correctly pointed out that in order for the rule to be applicable the breach relied upon must be a breach which is so substantial and fundamental as to go to the very root of the contract. **Knutson v. Metallic Slab Form Co.**, 128 F. (2) 408, 411, C. A. 5th; **Pasquel v. Owen**, 186 F. (2) 263, 270, C. A. 8th; **Chamberlin v. Booth & McLeroy**, 135 Ga. 719, 70 S. E. 569, 35 L. R. A. N. S. 1223; **Brady v. Oliver**, 125 Tenn. 595, 614, 147 S. W. 1135; **Restatement, Contracts, Section 347, Comment (e).**

The District Judge ruled that appellant's contention that it became impossible to fully perform the contract on his

part because of the virtual abandonment of the prime contract by Southern was answered by finding No. 1 of the jury that Southern did not interfere with appellant in the performance of his work. Finding No. 2 of the jury recognized the fact that Southern did not make payments to appellant as if received payment from the Government, as required by the contract. Finding No. 3 upheld appellant's contention that he was induced to leave the job because of this failure to make progress payments. However, the District Judge was of the opinion that these findings did not answer the ultimate question presented, namely, whether the failure to make the payments was such a fundamental breach of the contract as to justify appellant in abandoning the contract and seeking recovery in quantum meruit instead. He was of the opinion that under the particular circumstances of this case, it was not such a breach. He pointed out that the supplemental agreement of October 7, 1955, was entered into because appellant was unable to furnish the bond required by the original contract, making it necessary for Southern to protect itself against the claims of materialmen and suppliers of appellant; that the supplemental agreement gave Southern the option to make payments to appellant and materialmen jointly which would furnish such protection; that if the payments had been made jointly to appellant and the materialmen when received by Southern from the Government, appellant would nevertheless not have received any money; and that, accordingly, Southern's failure to make payment to the materialmen as payment was received from the Government did not interfere with appellant's performance of the contract unless a supplier refused to furnish appellant with the necessary materials because of the failure to receive payments. The evidence not only failed to show any such refusal on the part of a supplier, but, on the contrary, showed that the suppliers cooperated in furnishing what appellant needed to complete the job. The

breach of an agreement which causes no loss to the plaintiff will not sustain a suit for rescission. **Block v. City of West Palm Beach**, 142 F. (2) 949, 952, C. A. 5th; **Pasquel v. Owen**, supra, 186 F. (2) 263, 270, C. A. 8th. We agree with the ruling of the District Judge. **Knutson v. Metallic Slab Form Co.**, supra, 128 F. (2) 408, 411, C. A. 5th.

Compulsory Counterclaim.

Appellant contends that the District Judge was in error in permitting Southern to include in its counterclaim in this case the $35,000.00 payment made to the Atlas Supply Company in August 1956, in that under Rule 13 (a), Rules of Civil Procedure, this payment was a compulsory counterclaim which should have been filed and litigated in appellant's action against it in the District Court in Georgia, and therefore could not be used in this action.

Rule 13 (a) provides as follows:

> "(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Although Rule 13 (a) does not expressly provide that failure to assert a compulsory counterclaim in a prior suit will bar its assertion in a later suit, such is the effect of the rule. The principle of res judicata applies to all such claims which should have been raised, even though actually omitted. **Moore's Federal Practice, Vol. 3, Sec. 13.12;**

United States v. Eastport Steamship Corp., 255 F. (2) 795, 805, C. A. 2nd; **Hancock Oil Co. v. Universal Oil Products Co.**, 115 F. (2) 45, 47, C. A. 9th; **Pennsylvania R. Co. v. Musante-Phillips, Inc.**, 42 F. Supp. 340, 341, N. D. Cal.; **Gallahar v. George A. Rheman Co.**, 50 F. Supp. 655, 661, S. D. Georgia.

We are of the opinion that this payment arose "out of the transaction" which was the subject matter of the suit filed in the District Court in Georgia, within the meaning of the rule. "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." **Moore v. N. Y. Cotton Exchange**, 270 U. S. 593, 609-610. The test generally applied in determining whether a counterclaim is compulsory is whether there is a logical relationship between the claim and counterclaim. Only claims that are unrelated, or are related but within the exceptions stated in the rule, need not be pleaded. **Moore's Federal Practice, Vol. 3, Sec. 13.13; United Artists Corp. v. Masterpiece Productions, Inc.**, 221 F. (2) 213, 216, C. A. 2nd; **United States v. Eastport Steamship Corp.**, supra, 255 F. (2) 795, 805, C. A. 2nd; **Arvey Corp. v. Peterson**, 178 F. Supp. 132, 138, E. D. Pa.

The $35,000.00 payment to the Atlas Supply Company was a payment on an indebtedness of appellant to Atlas Supply Company arising out of both the Fort Benning contract and the Fort Campbell contract. No part of it was apportioned to either job. The indebtedness had been consolidated into a single account. The payment extinguished all the indebtedness of the appellant to Atlas Supply Company arising out of both projects and entitled Southern to a credit of $35,000.00 against any claim that appellant might make under either of the two contracts. In our opinion, it was a compulsory counterclaim to be

asserted by appellant at the time it filed its first answer and counterclaim in the suit in the District Court in Georgia.

The District Judge, in permitting the claim to be included in the counterclaim in the Tennessee suit, was of the opinion that the claim arose out of both projects; that Southern was required to use it as compulsory counterclaim when it filed its answer in the Georgia suit; that when appellant separated his claims and filed the second suit in Tennessee, Rule 13 (a) required Southern also to plead the same claim in the suit in Tennessee in that it also grew out of the transaction which constituted the subject matter of the Tennessee suit; that if the claim had been adjudicated in the Georgia suit, it could not be litigated a second time in the Tennessee suit; that the claim was not adjudicated in the Georgia suit; and since Southern was required by Rule 13 (a) to plead it in the Tennessee suit and it had not been adjudicated in the Georgia suit, the District Court in the Tennessee suit had jurisdiction to hear and adjudicate the claim.

The District Judge also expressed the opinion that when Southern filed its answer in the Tennessee suit, this claim was the subject of another pending action, namely, the suit in the District Court in Georgia; that by reason of the exception contained in Rule 13 (a), it was accordingly not a compulsory counterclaim in the Tennessee suit; but because it grew out of that transaction it was a permissive counterclaim in that suit and could be adjudicated in that suit if not previously adjudicated by the court in Georgia. The exception in Rule 13 (a) provides that if the claim is the subject matter of another pending action, such claim "need not be so stated" (emphasis added) in the defendant's answer. It was reasoned by the District Judge that this is an exception running in favor of the defendant, which, although not requiring a defendant to plead such

a claim, gives him an option to do so if he so desires. Reliance was placed upon the discussion of this question in **Moore's Federal Practice, Vol. 3, Section 13.14, page 38.** It will be noticed, however, that in the example there discussed, the prior pending action was filed in a state court and did not involve a compulsory counterclaim under Federal Rule 13 (a).

We believe the ruling of the District Judge misconstrues the rule. Rather than being a compulsory counterclaim in both suits, we consider the claim a potential compulsory counterclaim in either of the two suits, with its compulsory status maturing in the suit in which and at the time when Southern first filed a responsive pleading. Rule 13 (a) makes the counterclaim compulsory "at the time of serving the pleading." At the time when the answer was filed in the Georgia suit, the claim was not the subject of another pending action, and it was a compulsory counterclaim in that suit. If compulsory in that suit, it would not also be compulsory in a later suit. Nor should it be compulsory in one suit and at the same time be permissive in another suit pending between the same parties.

As pointed out above, the fact that it was not litigated in that suit, does not change its character as a compulsory counterclaim with the result that Southern is barred from subsequently asserting it in the present action. **United States v. Eastport Steamship Corp.**, supra, 255 F. (2) 795, 805, C. A. 2nd.

There might be merit in appellee's contention if there had been an allocation of the $35,000.00 payment between the indebtedness to Atlas Supply Company at Fort Benning and the indebtedness at Fort Campbell. But there was no allocation. In fact, at the time of the payment there was only one indebtedness, and so treated by the parties.

Appellant, in answer to the plea of inequitable hardship resulting from this ruling on a technical question of procedure, calls attention to the fact that final judgment has not yet been entered in the suit in the District Court in Georgia where the counterclaim should have been prosecuted. What effect our ruling in this case should have on that case, is not for us to say.

The rulings of the District Judge are affirmed in part and reversed in part.

The judgment of the District Court is vacated and the case remanded for further proceedings consistent with the views expressed herein.